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SUPREME COURT, U.S.

NO. 81-6437

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JIMMY LEE SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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(MEMBER OF THE BAR OF THIS COURT)

QUESTION PRESENTED

PAGE(S)

QUESTION

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND DEATH SENTENCE, IN WHICH IT APPROVED A PRACTICE WHEREIN THE TRIAL COURT SPECIFICALLY ADVISED THE JURY THAT HE HAD FOUND PETITIONER'S CONFESSION TO BE VOLUNTARY, LEFT UNREDRESSED A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS, AND ESTABLISHED PRECEDENT WHICH WILL PERMIT AND PERHAPS ENCOURAGE SUCH CONSTITUTIONALLY IMPROPER DISCLOSURE IN SUBSEQUENT CRIMINAL TRIALS. 5

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida in Smith v. State, 407 So.2d 894 (Fla. 1981) is set forth in Appendix A. The motion for rehearing and the denial thereof are set forth in Appendix B.

JURISDICTION

Review is sought pursuant to 28 U.S.C. § 1257(3). The judgment below was entered on November 12, 1981, and petitioner's timely motion for rehearing was denied on January 28, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a criminal conviction resulting in imposition of the death penalty. Constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted, after a jury trial, of two counts of first degree murder, and was sentenced to death. At trial, the court heard evidence, outside the presence of the jury, regarding the voluntariness of petitioner's inculpatory statements. He ruled that the statements were voluntary and therefore admissible. When the jury returned, and as the state proceeded to introduce the statements into evidence, the court commented three times in succession (see Appendix A, p. 4):

> The Court has ruled that the statement has been freely and voluntarily given by the Defendant, Jimmy Lee Smith, and admitted into evidence. It will be for your consideration at this time.
>
> * * * * * * *
>
> The Court will rule that this statement was freely and voluntarily given. It will be admitted into evidence at this time.
>
> * * * * * * *
>
> The Court will rule that that statement was freely and voluntarily given and will now be admitted into evidence.

On appeal to the Supreme Court of Florida, petitioner argued, inter alia, that the trial court erred by informing the jury that he had found the statements voluntary, since such comment on the evidence would necessarily tend to influence the jury's determination of the weight and credibility of the statements. Petitioner also argued on appeal that the trial court erred by failing to give the jury any instruction regarding the weight to be given a confession. The state, in its answer brief, contended, inter alia, that petitioner was barred from asserting these issues on appeal, as a result of defense counsel's failure to object to the trial court's disclosure to the jury of its finding of voluntariness, and his failure to object to the omission of an instruction on the weight to be given a confession.

The Supreme Court of Florida issued an opinion on November 12, 1981, affirming petitioner's convictions and death sentences. The Court determined that the trial court's failure to instruct the jury on the weight to be accorded a confession was error, but further concluded that it was not "fundamental error", and therefore was not cognizable for the first time on appeal. Smith v. State, supra, at 897-98. With respect to the trial court's advising the jury of its finding of voluntariness, the Florida Supreme Court did not apply a contemporaneous objection rule, but rather addressed the issue on the merits and concluded that such disclosure was not error. The Court said:

> We see the statements as attempts to comply with the requirement expressed in Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967), that the trial court clearly indicate, in the record, its conclusion that any confession admitted into evidence was voluntarily made:
>
> > [I]t is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that

> the confession is voluntary must appear from the record with unmistakable clarity.

Id. at 544, 87 S.Ct. at 643.

Referring to the same topic, this Court stated as follows:

> The requirement of the Fourteenth Amendment is that the trial judge make a determination that a confession was freely and voluntarily given before he allows it to be considered by a jury. A specific finding of voluntariness is necessary to ensure that a judge has properly met this requirement.

McDole v. State, 283 So.2d 553, 554 (Fla. 1973) (citations omitted).

> The judge in the case sub judice was doing just that: making, with unmistakable clarity, a finding for the record that appellant's confessions were voluntarily made. His comments, therefore, were not improper.

Smith v. State, supra, at 897.

Petitioner timely moved for rehearing, which was denied on January 28, 1982.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner asserted on appeal that his right to due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as by Article I, Section 9 of the Florida Constitution, was violated by the trial court's disclosure to the jury of his finding that petitioner's statements were voluntary, and by the court's failure to instruct the jury on the weight to be given a confession. Smith v. State, supra, at 896-97. The Supreme Court of Florida addressed the former issue on the merits, and concluded that the trial court's disclosure to the jury of its finding of voluntariness was a proper means of complying with the requirement expressed in Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967),

that before admitting a confession into evidence, the court must make, with unmistakable clarity, a finding for the record that the confession was voluntarily made. Smith v. State, supra, at 897.

REASONS FOR GRANTING WRIT

QUESTION PRESENTED

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND DEATH SENTENCE, IN WHICH IT APPROVED A PRACTICE WHEREIN THE TRIAL COURT SPECIFICALLY ADVISED THE JURY THAT HE HAD FOUND PETITIONER'S CONFESSION TO BE VOLUNTARY, LEFT UNREDRESSED A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS, AND ESTABLISHED PRECEDENT WHICH WILL PERMIT AND PERHAPS ENCOURAGE SUCH CONSTITUTIONALLY IMPROPER DISCLOSURE IN SUBSEQUENT CRIMINAL TRIALS.

The trial judge, on three successive occasions, gratuitously advised the jury that he had found that petitioner's statements were freely and voluntarily made. On appeal, the Supreme Court of Florida specifically approved this disclosure as a proper means of complying with the requirements set forth in Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967) and McDole v. State, 283 So.2d 553 (Fla. 1973) that before admitting a confession into evidence the trial court must make, with unmistakable clarity, a finding for the record that the confession was voluntarily made. In so holding, the Florida Supreme Court reached the polar opposite conclusion from virtually every other appellate court which has had occasion to discuss the issue. Until now, it has consistently been held, assumed, or stated by way of dicta, that the trial court's finding of voluntariness should not be disclosed to the jury. See United States v. Bear Killer, 534 F.2d 1253, 1258-59 (8th Cir. 1976); United States v. Barry, 518 F.2d 342, 348 (2nd Cir. 1975); United States v. Harper, 432 F.2d 100, 102 (5th Cir. 1970); Ellis v. Fitzharris, 407 F.2d 799, 803 n.8 (9th Cir. 1969); United States v. Fayette, 388 F.2d 728, 736 (2nd Cir. 1968); Kristiansand v. United States, 384 F.2d 301 (5th Cir. 1967); Clifton v. United States, 371 F.2d 354, 360 (D.C. Cir. 1966); United States v. Inman, 352 F.2d 954 (4th Cir. 1965).

See also Kagebein v. State, 496 SW.2d 435, 440-41 (Ark. 1973); Walker v. State, 488 SW.2d 40, 41 (Ark. 1972); Duguay v. State, 240 A.2d 738, 740 (Maine 1968); Dempsey v. State, 355 A.2d 455, 460-63 (Md. 1976); Harris v. Commonwealth, 358 NE.2d 991, 993 n.3 (Mass. 1976); State v. Yough, 231 A.2d 598, 604 (N.J. 1967); State v. Loray, 195 A.2d 289, 292 (N.J. 1963); State v. Smith, 161 A.2d 520, 545-46 (N.J. 1960); State v. Carter, 151 SE.2d 602, 605 (N.C. 1966); State v. Barber, 151 SE.2d 51, 53 (N.C. 1966); State v. Seal, 160 NW.2d 643, 647 (S.D. 1968); Noe v. Commonwealth, 153 SE.2d 248, 250 (Va. 1967).

Florida employs the "Orthodox Rule" in determining the voluntariness of a confession. See Palmes v. State, 397 So.2d 648, 653 (Fla. 1981); Leach v. State, 132 So.2d 329, 333 (Fla. 1961); Bates v. State, 78 Fla. 692, 696, 84 So. 373, 374-75 (1919). Evidence concerning the voluntariness of a confession is presented first to the trial judge, who determines admissibility, and then to the jury, which determines the weight to be accorded the confession considering, inter alia, the circumstances under which it was made. Palmes v. State, supra, at 653. The initial inquiry into voluntariness, to determine admissibility, must be held in the absence of the jury. Allen v. State, 239 So.2d 33 (Fla. 1st DCA 1970); see McDonnell v. State, 336 So.2d 553 (Fla. 1976); Land v. State, 293 So.2d 704 (Fla. 1974). Since the jury must also be allowed to consider the voluntariness of the confession, among other factors and circumstances, in determining what weight to give it, it is inherently and fundamentally unfair to permit the jury's assessment to be influenced, if not effectively dictated, by the trial court's announced finding that he has found the confession voluntary. See United States v. Bear Killer, 534 F.2d 1253, 1259 (8th Cir. 1976); United States v. Barry, 518 F.2d 342, 348 (2nd Cir. 1975).

In United States v. Bear Killer, supra (at 1258), the trial court had instructed the jury in the following manner:

> The Court instructs you that it has found that the statement made by the defendant at the time of his arrest was voluntary and based upon the Court's finding the Government witnesses were permitted to testify as to certain statements which the defendant was alleged to have made. However, it is for the jury to determine the credibility and weight to be given to such statements with respect to the defendant's innocence or guilt.

The Eighth Circuit Court of Appeals concluded that the above instruction was violative of 18 U.S.C. § 3501(a), which provides that if the trial judge determines that a confession was voluntarily made it shall be admitted into evidence, and that the jury shall then be permitted to hear relevant evidence on the issue of voluntariness and shall be instructed to give such weight to the confession as they feel it deserves under all the circumstances. [As previously noted, Florida uses a similar procedure.] The Court of Appeals went on to discuss the constitutional basis of its holding:

> Moreover, irrespective of the statutory command, fairness requires that the court not disclose to the jury its finding of voluntariness. See United States v. Harper, 432 F.2d 100, 102 (5th Cir. 1970); Ellis v. Fitzharris, 407 F.2d 799, 803 n.8 (9th Cir. 1969); United States v. Fayette, 388 F.2d 728, 736 (2nd Cir. 1968). Disclosure places upon the in-custody statements the imprimatur of the court which, it must be presumed, influences the jury. See Lego v. Twomey, supra 404 U.S. at 483-484, 92 S.Ct. at 623-624, 30 L.Ed. 2d at 623-624.
>
> The determination of the admissibility of in-custody statements turns upon their voluntariness. The court, in the suppression hearing, is concerned solely with the vindication of the constitutional right. Indeed it is error for the court to consider, in any degree, the reliability of the confession. Id. 404 U.S. at 484 n.12, 92 S.Ct. at 624, 30 L.Ed.2d at 624; Hutcherson v. United States, 122 U.S. App.D.C. 51, 351 F.2d 748, 755 (1965). Hence, the instruction which discloses the court's finding of voluntariness

> not only improperly influences the jury in its determination of guilt or innocence, but does so when the reliability of the in-custody statements was irrelevant to the court's finding and not determined by it. Moreover, the government's burden of proving guilt beyond a reasonable doubt under In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970), is lightened to the extent that the jury accepts the in-custody statements as truthful because of the court's determination, made upon a preponderance of the evidence, that the statements are voluntary. See Lego v. Twomey, supra 404 U.S. at 486, 92 S.Ct. at 625, 30 L.Ed.2d at 625.
>
> United States v. Bear Killer, supra, at 1259.

[But see Dempsey v. State, 355 A.2d 455, 460-63 (Md. 1976), holding that the trial court's disclosure to the jury that he has found a confession voluntary is improper, but declining to hold that the error is of constitutional dimension.]

Under Florida law the state has the burden of proving, by a preponderance of the evidence, that a confession was freely and voluntarily given. Peterson v. State, 382 So.2d 701, 702 (Fla. 1980); McDole v. State, 283 So.2d 553, 554 (Fla. 1973); see Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1977). Therefore, as recognized in Bear Killer, the practice of informing the jury of the court's finding of voluntariness, approved in Florida by the state Supreme Court in the instant decision, will carry the dual consequences of (1) improperly influencing the jury's determination of the reliability of a confession, and (2) lightening the state's burden of proving guilt beyond a reasonable doubt.

The appellate court in Bear Killer held that the instruction which advised the jury of the trial court's finding of voluntariness "should not have been given and is not to be given in the future." United States v. Bear Killer, supra, at 1259. However, since that court had not previously spoken on the matter, it considered whether, upon review of the entire proceedings, the

error was harmless, and concluded that it was. A comparison between Bear Killer and the instant case presents some interesting contrasts on this point. In Bear Killer, the trial court stated expressly in its instruction that its finding of voluntariness was relevant only to admissibility and that the weight to be given the statements on the issue of innocence or guilt was solely for the jury. This instruction "mitigated the inference that voluntary statements are also truthful statements." United States v. Bear Killer, supra, at 1259. See also United States v. Standing Soldier, 538 F.2d 196, 203-04 (8th Cir. 1976); United States v. Fayette, 388 F.2d 728, 735-36 n.4 (2nd Cir. 1968). In the present case, the trial court failed to give the jury any instruction concerning its role in evaluating the weight or credibility of a confession. See United States v. Barry, supra, at 345-48 [holding that it was fundamental error, under 18 U.S.C. § 3501(a), for trial court to fail to instruct the jury as to the nature of its role in evaluating a confession, and emphasing that "the jurors are all too apt to conclude that the judge has made a binding determination that the confession was in fact and law voluntary or, perhaps more serious, true."]

In Bear Killer, the proof included an eyewitness account of the crime and corrobative testimony as to Bear Killer's intent to shoot the victim. In the present case, the evidence aside from petitioner's statements was circumstantial at best, and the element of premeditation was established solely by the confession. See Smith v. State, supra, at 898. In Bear Killer, the government sought a conviction of second degree murder, but the jury exercised its independent judgment and returned a verdict of guilty of the lesser offense of involuntary manslaughter. In the instant case, the state asked the jury to convict petitioner of first degree murder and to recommend the death penalty, and the jury did so. In Bear Killer, as here, there was no evidence that the statements were the product of coercion.

Most significantly, aside from the question of whether the Florida Supreme Court could properly have concluded that the trial court's disclosure to the jury of his voluntariness finding was harmless error or non-fundamental error,[1] the fact remains that the Florida Supreme Court did not do so, but held instead that such disclosure was perfectly proper. On motion for rehearing, petitioner pointed out to the Court that the effect of such a holding, as precedent, will be to permit and possibly encourage trial courts to inform the jury of a ruling that a confession was freely and voluntarily made, even in cases in which the voluntariness of the confession is hotly disputed. (See Appendix B, p. 7). In Lego v. Twomey, supra, 404 U.S. at 485-86, 30 L.Ed. 2d at 625-26, this Court said:

> Nothing in [Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)] questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since Jackson as he was before to familiarize a jury with the circumstances that attend the taking of his confession including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corrobated or otherwise deemed unworthy of belief.

See also United States v. Raddatz, 447 U.S. 667, 678, 100 S.Ct. 2406, 65 L.Ed.2d 424, 435 (1980); Kagebein v. State, 496 SW.2d 435, 440 (Ark. 1973).

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[1] The Florida Supreme Court did not rely on a contemporaneous objection rule with respect to the trial court's advising the jury of his finding that petitioner's confession was voluntary. The Court addressed the merits and held that such disclosure was not error. Consequently, federal review of the constitutional validity of the state court's holding is not barred. Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981); Braxton v. Estelle, 641 F.2d 392, 394 (5th Cir. 1981); Moran v. Estelle, 607 F.2d 1140, 1141-42 (5th Cir. 1979); see County Court of Ulster County v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979); Francis v. Henderson, 425 U.S. 536, 542, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

Lego v. Twomey, supra, held that judging the admissibility of a confession by the preponderance of the evidence did not violate the principle, expressed in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that the due process clause protects an accused in a criminal prosecution against a conviction except upon proof beyond a reasonable doubt. Significantly, Lego did not challenge the constitutionality of the standard by which the jury was instructed to decide his guilt or innocence. Lego v. Twomey, supra, 404 U.S. at 487, 30 L.Ed.2d at 626. Where, as here and as in future trials in which the Florida Supreme Court's precedent may be followed, the trial court's finding of voluntariness (made by a preponderance of the evidence) is conveyed to the jury as a finding of fact, the jury's ability to independently determine the reliability of the confession is compromised, and to the extent that the jury accepts the court's announced finding, the state's burden of proof is lightened. United States v. Bear Killer, supra. Where, as here, the jury is not even instructed that it has any role at all in determining the weight or credibility to be given the confession, the problem is greatly exacerbated. In this capital case, in which the only evidence of premeditation was supplied by the confessions, the jury was not only left entirely to its own devices in considering the confessions as in United States v. Barry, supra, but the trial court affirmatively stated to the jury that he had found the confessions voluntary. Under these circumstances, the jury had no reason to believe that the confessions could be anything other than conclusive; in effect, a "guilty plea in slow motion."

The issue presented here is essentially the reverse of that resolved in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). This Court there held that due process requires a separate determination of of the voluntariness of a confession, uninfluenced by consideration of its reliability. The Court perceived the danger that matters pertaining to guilt

would distort the jury's finding of fact as to voluntariness. Under the precedent set forth by the Florida Supreme Court in the present case, the trial court's announcement to the jury that he has found a confession voluntary will distort the jury's assessment of the reliability of the confession, and the weight to be accorded the confession.

This Court should grant certiorari in the present case because petitioner's first degree murder conviction and sentence of death were obtained pursuant to constitutional error, in that the trial court informed the jury that he had found petitioner's confession to be voluntary, and because the Florida Supreme Court's express approval of this practice ensures that the error will be a recurring one.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

Steven L Bolotin

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petition for Writ of Certiorari to the Supreme Court of Florida has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Jimmy Lee Smith, #035167, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 24th day of March, 1982.

Steven L Bolotin

STEVEN L. BOLOTIN